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Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?

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What market model should determine the boundaries of negative integration, and in particular: what test should the Court apply to Article 34 TFEU? After Keck, *there is no single answer to this question. Having expressly acknowledged the existence of different tests for different types of measures, the post-*Keck *Court develops three jurisprudential lines that follow three different market models. While confining measures regulating selling arrangements to an international model, the Court also confirms the parameters of the* Cassis *model for product requirements; and with* Italian Trailers*, it cultivates a third jurisprudential line on consumer-use restrictions that comes close to a national market model. It is in the context of this third line that the Court elevates the market access principle to centre-stage; and it is this development that has prompted the question how the three jurisprudential lines relate to each other. Have they remained separate – parallel – lines; or have they converged in a single doctrinal framework that generally applies to all measures falling within Article 34? In* Ker-Optika *and its progeny, the Court appears to rhetorically combine all three lines in an unitary framework; yet various ambivalences within this doctrinal solution have remained. This article explores the possibilities for a doctrinal framework and charts the unstable post-*Keck *jurisprudence on Article 34 TFEU in light of such an unitary framework.*

Introduction

In the history of European integration three ideal-typical market models can be distinguished: an "international" model, a "federal" model, and a "national" model.[1]

Under the (modern) international model, each State commits itself to limiting its *external* sovereignty by opening its national borders to foreign goods, while it fully retains internal sovereignty over "its" national market. According to this principle of "host state" control, the importing state must not discriminate against imports. The prohibition of discrimination thereby quintessentially requires States not to establish a set of rules that *distinctly* apply to imports; but discrimination is equally outlawed when indistinctly applicable "internal" measures materially discriminate against imports. By contrast, the "federal" model accepts that within a "common market" States must lose part of their *internal* sovereignty over "their" national market. In line with the principle of "home state" control, goods are here generally entitled to be freely sold on a "foreign" market once they comply with the law of their home state. Finally, according to the "national" market model, all trade restrictions that are above a – legislative or judicial – Union standard must be removed. The legal structure of the "internal market" is here assimilated to that of a "national market". Where a State adopts rules that are higher than a Union standard, this higher national standard will violate the free movement provisions – even when this standard is applied to a State's own "home" production.

Which market philosophy informs Article 34 TFEU? The philosophy behind Article 34 has significantly changed over time. Having started out on the basis of an international market model,[2] the Court subsequently embraced a federal model and even flirted with a

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[1] For a different construction of economic ideal-types within the internal market, see: M. Maduro, We The Court: The European Court of Justice and the European Economic Constitution (Hart, 1998), esp. Chapters 4. Maduro distinguishes three *non*-descriptive models that he characterises as "alternative[s]" to the existing jurisprudence on the free movement of goods. The three models are: a decentralised model, a competitive model, and a centralised model. The author defines them as follows (ibid., 109): "The centralised model reacts to the erosion of national regulatory powers through Article [34] by favouring a process of market regulation by means of replacement of national laws with [Union] legislation. The competitive model promotes "competition among national rules", notably through the principle of mutual recognition of national legislation. In the decentralised model, States will retain regulatory powers, but are, at the same time, prevented from developing protectionist policies." This article cannot be the place to provide an in-depth critique of Maduro's descriptive analysis of Article 34 TFEU and his suggested normative theory. For an extensive discussion here, see: R. Schütze, From International to Federal Market: The Changing Structure of European Law (in preparation), esp. *Conclusion*.

[2] Ibid., Chapter 3.

national market model.[3] The *Keck* judgment however put this linear evolution into question;[4] and the post-*Keck* jurisprudence confirmed that different types of measures are subject to different tests governed by a different market philosophy. What are these tests for which types of measures; and what, if any, is the relationship between these three jurisprudential lines? Section 1 briefly revisits the historical emergence of the three distinct doctrinal tests, while Section 2 explores the question how these three tests relate to each other. Two possibilities here exist. According to the (classic) *category approach*, each of the three tests simply correlates with a specific type of measure. By contrast, according to a (new) *unitary approach*, the Court regards all three tests as generally applicable tests: any national measure that hinders trade will have to be assessed against each of the three tests. Having examined the gradual emergence of a unitary approach in Section 2, Section 3 subsequently analyzes the (unstable) recent jurisprudence of the European Court of Justice and the uncertainties that has created. A *Conclusion* will finally plead in favour of a single – balanced – doctrinal framework.

Diverging Jurisprudential Lines: Different Tests for Different Categories

Unlike the international market created under the GATT, the idea of an "internal" market is based on the principle that States will have to give up part of their *internal* sovereignty over "their" national market. Within the US American market, this happened when the (dormant) Commerce Clause expanded to include intra-state commerce and thereby outlawed equally applicable State measures that "excessively burdened" commerce.[5] Within Article 34 TFEU, such a federal moment arrived with the emergence of the principle of mutual recognition in *Cassis de Dijon*.[6] According to that federal principle, goods are generally entitled to move freely within the European internal market if they comply with the law of their home state; and the host state is therefore, in principle, no longer allowed to impose its (internal) sovereignty over imported goods.

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[3] Ibid., Chapter 4.

[4] Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases C-267/91 and C-268/91, EU:C:1993:905.

[5] R. Schütze, From International to Federal Market (supra n.1), Chapter 2.

[6] Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon"), Case 120/78, EU:C:1979:42. For an overview of the principle, see: K. Armstrong, Mutual Recognition, in C. Barnard & J. Scott, The law of the single European Market: Unpacking the Premises (Hart, 2002), 225.

What was the scope of this federal principle within Article 34? Originally created for a specific type of measure – product requirements – would the Court expand the model to other types of – internal – State legislation? In the period after *Cassis*, the Court intensely struggled with this question;[7] and ultimately settled on a controversial solution in the *Sunday Trading* Cases.[8] The Court here subjected the British prohibition to work in shops on Sundays to a trade-restrictiveness test that was clearly based by a national market model. For instead of examining intra-Union *disparities* between national opening times, the Court found that the very *existence* of the national measure constituted a restriction of trade. It seemed that any national measure that "directly or indirectly, actually or potentially" hindered trade could thus be caught by Article 34. The danger of this national market test – expressed through the famous *Dassonville* formula[9] – however soon became apparent: Article 34 TFEU would evolve into an uncontrollable "economic due process" clause, which allowed traders to potentially challenge all *national* interferences into the European market. The Court soon reacted, and the famous admission that the market philosophy behind Article 34 had gotten out of control was made in *Keck*.[10] With *Keck* the Court acknowledged – for the first time in an express manner – that different categories of national rules were subject to different tests.[11] While confirming the *federal* principle of mutual recognition for product requirements, it (re)introduced an *international* discrimination test for selling arrangements. These two tests were eventually joined by a

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[7] For the two parallel approaches developed by the Court, see: R. Schütze, From International to Federal Market (supra.1), Chapter 4 – Section I(2)

[8] In particular: Torfaen Borough Council v B & Q plc , Case 145/88, EU:C:1989:593. For an analysis of these (in)famous Sunday Trading Cases, see: A. Arnull, What Shall we Do on Sunday?, (1991) 16 European Law Review 112; P. Diamond, Dishonourable Defences: The Use of Injunctions and the EEC Treaty – Case Study oft he Shops Acts 1950, (1991) 54 MLR 72; R. Rawlings, The Eurolaw Game: Some Deductions from a Saga, (1993) 20 Journal of Law and Society 309; C. Barnard, Sunday Trading: A Drama in Five Acts, (1994) 57 Modern Law Review 449.

[9] Procureur du Roi v Benoît and Gustave Dassonville, Case 8/74, EU:C:1974:82.

[10] Keck and Mithouard, Joined cases C-267/91 and C-268/91 (supra n.4). The Court indeed expressly admitted that something had gone wrong (ibid., para.14): "In view of the increasing tendency of traders to invoke Article [34 TFEU] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter." For the vast literature on the Keck judgment, see only: D. Chalmers, Repackaging the internal market: the ramifications of the Keck judgment, (1994) 19 E.L. Rev. 385; L. Gormley, Reasoning Renounced? The Remarkable Judgment in Keck & Mithouard, (1994) European Business Law Review 63; A. Mattera, De l'arrêt 'Dassonville' à l'arrêt 'Keck' : l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions, (1994) Revue du Marché Unique Européen 117; R. Joliet, Der freie Warenverkehr : Das Urteil Keck und Mithouard und die Neuorientierung der Rechtsprechung, (1994) 43 Geweberblicher Rechtsschutz und Urheberrecht (Internationaler Teil), 979; S. Weatherill, After Keck : some thoughts on how to clarify the clarification, (1996) 33 C.M.L. Rev. 885.

[11] The Court had done this – albeit in an implicit manner – since the very beginning. The principal distinction in the past here was between "border measures" and "internal measures".

third test for a third type of measure. Let us have a closer look at both post-Keck tests again before investigating how all three tests relate to each other in the next section.

"Selling Arrangements": An (International) Discrimination Test

In the history of European law, the *Keck* judgment represents a rare and dramatic "revolution" (in the original sense of the word), because the Court here "returned" to an (international) discrimination test within Article 34. The case concerned criminal proceedings against two supermarket managers who had violated a French law prohibiting the selling of goods at a loss. This was a sales restriction that was designed to prevent unfair competition and which applied indistinctly to all goods – whether domestic or imported. The national legislation was nonetheless claimed to restrict the sales volume of imported goods, yet the Court found it essential to point out that "the question remain[ed] whether such a possibility is *sufficient* to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports".[12] Its famous "no" was worded in the following way:

> *"[C]ontrary to what has previously been decided*, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, *so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.*"[13]

The Court here returned to an (international) discrimination test for a type of national measure that it formally described as "selling arrangements".[14] Unlike "product requirements", these selling arrangement would not violate Article 34 if two conditions were fulfilled. First, the measures would apply to all traders within the national territory, that is: they had to be indistinctly applicable within the national market; and second,

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[12] Keck and Mithouard, Joined cases C-267/91 and C-268/91 (supra n.4), para. 13.

[13] Ibid., para.16 (emphasis added). For a criticism of the decision, see: A. Mattera, De l'arrêt 'Dassonville' à l'arrêt 'Keck': l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions, (1994) Revue du Marché Unique Européen 117.

[14] For the definition of "selling arrangements", see only: Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag, Case C-368/95, EU:C:1997:325.

these selling arrangements would need to "affect in the same manner, in law and in fact" the marketing of domestic and imported goods. This dual *Keck* test boiled down to a prohibition of formal or material discrimination; and through the introduction of an discrimination test, the Member States had regained a degree of internal sovereignty over their own national market.

"Consumer-Use Restrictions": A (National) Market-Access Test

The *Keck* revolution had primarily been a revolution against the mechanical application of the *Dassonville* formula; and yet: less than two decades after the judgment, the Court would restart the development of a "national" test in the context of consumer-use restrictions.[15] This new jurisprudential line, and its corresponding test, was born in *Commission v Portugal*;[16] yet the more famous manifestation is *Italian Trailers*.[17] An Italian highway law here prohibited the use of trailers on motorcycles and mopeds on highways. The Commission considered the provision to constitute a violation of Article 34 and brought proceedings against Italy. After considerable disagreement among various Advocates-General,[18] the Court held that "a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member

[15] For general academic analyses of the 'consumer restriction' cases, see: E. Spaventa, Leaving "Keck" behind?: The free movement of goods after the rulings in "Commission v Italy" and "Mickelsson and Roos", (2009) 34 E.L. Rev. 914; S. Enchelmaier, "Moped Trailers", "Mickelsson & Roos", "Gysbrechts" : the ECJ's case law on goods keeps on moving, (2010) 29 Yearbook of European Law 190; P. Oliver, Of trailers and jet skis : is the case law on Article 34 TFEU hurtling in a new direction?, (2010) 33 Fordham International Law Journal 1423; L. Gormley, Free movement of goods and their use : what is the use of it?, 33 Fordham International Law Journal 1589; P. Wennerås and K. Bøe Moen, Selling arrangements, keeping Keck, (2010) 35 E.L.Rev. 387.

[16] Commission v Portugal, Case C-265/06, EU:C:2008:210.

[17] Case C-110/05, Commission v. Italy (Italian Trailers), EU:C:2009:66.

[18] This case had been originally allocated to Advocate General Léger, who delivered his opinion on 5 October 2006 (EU:C:2006:646). Interestingly, this view was not to be shared by Advocate General Kokott in a related case (see Åklagaren v Percy Mickelsson and Joakim Roos, Case C-142/05, EU:C:2006:782). In light of these conflicting signals, the Court consciously re-allocated the case from a five-judge chamber to the Grand Chamber, reopened the oral procedure, and invited all the Member States to give their views on whether, and to what extent, Article 34 should cover usage restrictions. A second opinion, this time by Advocate General Bot, was delivered on 8th July 2008. The latter argued "that national measures governing conditions for the use of goods should not be examined in the light of the criteria laid down by the Court in *Keck and Mithouard"* (ibid., para.11).

State".[19]

This reasoning clearly stepped outside the dichotomy of *Cassis*-related product requirements and *Keck*-defined selling arrangements. The Italian measure was in fact neither; and faced with this new type of measure, the Court therefore elevated a market access test to a third and independent test. (The Court had carefully prepared this doctrinal promotion in its "preliminary observations".[20]) This promotion was confirmed in *Mickelsson & Roos*.[21] The case involved a Swedish restriction on the use of personal watercraft (jet skis), which could only be used on generally navigable or on specifically designated waterways. In the course of criminal proceedings, it was pleaded that the Swedish legislation constituted a violation of Article 34 TFEU. In its reply to a preliminary question, the Court confirmed its market-access test for use restriction as follows:

> "[W]here the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended *or of greatly restricting their use*, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where there is a justification pursuant to Article [36] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34]."[22]

Having expressly clarified that there was no need to show discrimination,[23] the sole concern was whether the rules totally or "greatly" prevented consumers from using products. And: in the absence of any reference to the principle of mutual recognition and the laws of other Member States, this new market access test was inspired by a *national* market model (that was nonetheless qualified by a substantial threshold).[24] After *Italian*

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[19] Case C-110/05, Commission v. Italy (Italian Trailers), para. 56.

[20] For this important point, see infra n.? below.

[21] Case C-142/05, Åklagaren v. Mickelsson and Roos, EU:C:2009:336.

[22] *Ibid.*, para. 28 (emphasis added).

[23] Ibid., para.26.

[24] In this sense: P. Oliver, Of trailers and jet skis (supra n.15), 1467: "Consequently, restrictions on use are caught by article 34 TFEU if they fall within one of the following categories: (1) total bans on use (as in Commission v. Portugal and Trailers); (2) measures which prevent goods from being used "for the specific and inherent purposes for which they were intended"; and (3) measures which "greatly restrict" the use of goods."; as well as: P. Wennerås and K. Bøe Moen, Selling arrangements, keeping Keck (supra n.15), 395: "Judging from the norms set out and applied in Italian Trailers and Mickelsson and Roos it appears that the threshold inherent in the market hindrance test is high, and that it is significantly more qualified than the "substantial" market access test first proposed by A.G. Jacobs in Leclerc-Siplec and nurtured by

Trailers and its progeny, it was clear that there exited three tests for three different types of measures. What was the relationship between these three tests? Let us explore this question in the next section.

Converging Jurisprudential Lines: Two Doctrinal Possibilities

One of the central questions raised within academic circles after *Italian Trailers* was whether the Court had abandoned its *Keck* jurisprudence.[25] Some doubts as to the demise of *Keck* surfaced quickly;[26] yet while reports about *Keck's* death may turn out to be greatly exaggerated, the – much - more important question was always this: what is the relationship between the three doctrinal tests developed in the three jurisprudential lines post-*Keck*? In its preliminary observations in *Italian Trailers*, the Court – following an earlier suggestion[27] – represented its existing case law as follows:

> "It should be recalled that, according to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article [34 TFEU]. It is also apparent from settled case-law that Article [34 TFEU] reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of [European] products to national markets."[28]

The *Dassonville* formula is here broken down into three (substantive) principles: the

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Advocates General and academics ever since." For the opposite view, see E. Spaventa, who claims that "the market access test is in no way qualified" in the two decisions (E. Spaventa, Leaving "Keck" behind? (supra n.15), 919).

[25] Ibid., at 929: '[F]or sure, the Court did not openly overrule Keck, and yet the market access formula might suggest, in fact if not in law, the end of the Keck dichotomy . . . the Keck distinction based on the type of rules is no longer relevant; what matters is the effect of the rules on market access.'

[26] See Case C-531/07, Fachverband der Buch- und Medienwirtschaft v. LIBRO, EU:C:2009:276; as well as Case C-108/09, Ker-Optika bt v. ÀNTSZ Dél-dunántúli Regionális Intézete, EU:C:2010:725. For an argument that Keck survived, see also: P. Wenneras & K. Boe Moen, Selling Arrangement, keeping Keck (supra n.15), 2010 ELRev 387; as well as: P. Oliver, Of trailers and jet skis (supra n.15), 1470: "Only rules relating to selling arrangements are subject to a test of de jure or de facto discrimination."

[27] Opinion of Advocate General Maduro, Alfa Vita Vassilopoulos AE, Case C-158/04, EU:C:2006:562, esp. paras.43-46.

[28] Italian Trailers Case, C-110/05 (supra n.17), paras.33-34 (references to Dassonville, Sandoz, Cassis and Keck). See also Mickelsson & Roos, Case C-142/05 (supra n.21), para.24.

international principle of non-discrimination, the *federal* principle of mutual recognition and the *national* principle of free market access. But how did these three principles relate to each other? Two possibilities here existed. According to the (classic) *category approach*, each of the three principles correlates with a specific type of measure. National rules affecting selling arrangements would thus be – exclusively – tested against the discrimination principle, product requirements would be subject to the principle of mutual recognition, and consumer restrictions fall – exclusively – under the market access test. (Under this approach, the market access test will thus only apply to measures that are neither subject to the *Keck* or *Cassis* line; and non-discriminatory selling arrangements or product requirements would therefore not fall foul of Article 34 via the market access test.) By contrast, according to a *unitary approach*, the Court could regard the three principles as generally applicable principles that each concretize the abstract *Dassonville* definition for all types of measures. Any national measure that hindered trade would thus have to be tested against each of the three principles – vertically ranging from the international discrimination test to the national market access test.

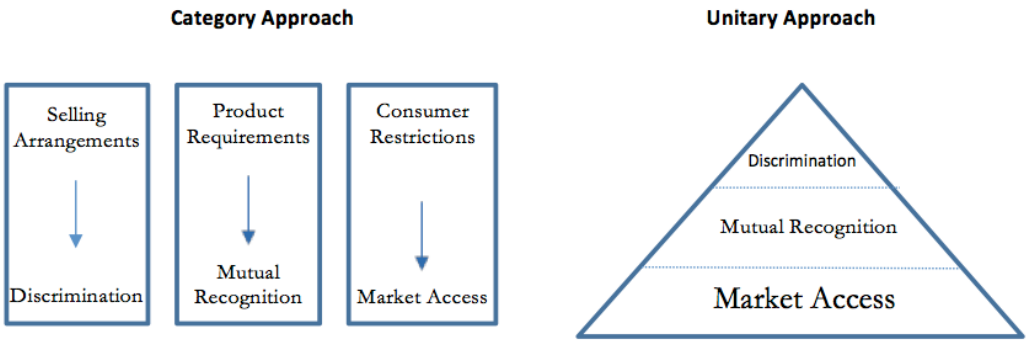

Figure 1. Two Approaches to Article 34

Which of the two approaches has the Court favoured? This section starts exploring this question in two steps. We shall begin by exploring the relationships between the three tests in the post-Keck case law and subsequently analyse the emergence of the *Ker-Optika* formula and its support for a unitary approach towards Article 34.

The Rise of the Market Access Test (and its Relation to the other two Article 34 Tests)

What is the relationship between the discrimination test and the market access test? Would selling arrangements only violate Article 34, when they themselves discriminated against imports; or did the Court eventually integrate elements of the federal or national market model by – for example – outlawing non-discriminatory legislation that created obstacles to a "European" wide advertisement campaign or that restricted the access of foreign goods to the national market?

From the very beginning, the relationship between the discrimination test and the market access test were indeed ambivalent. For the *Keck* Court had mysteriously held that whenever a national law affecting selling arrangement did not discriminate against imports, "the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State *is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products*".[29] This ambivalent linkage has bedevilled the academic and judicial commentaries until today. The *Keck* judgment nonetheless seemed to suggest that the discrimination test was controlling and as such dominating over the market access test.

Yet first doubts on this doctrinal relationship soon emerged. In *De Agostini*,[30] a Swedish company had advertised, on Swedish television, a children's magazine on dinosaurs. The magazine was printed in Italy and published in a number of language versions all across Europe. In Sweden however, the advertising campaign ran counter to an advertising ban for children under 12 years of age; and the question arose, whether the ban was prohibited under Article 34. The Court explored the discriminatory nature of the ban and suddenly admitted that it could not be "excluded that an outright ban, applying in one Member State, of a type of promotion for a product which is lawfully sold there might have a greater impact on products from other Member States".[31] This line of enquiry was elaborated in *Gourmet*.[32] The Court now dealt with an indistinctly applicable advertising

[29] Keck and Mithouard, Joined cases C-267/91 and C-268/91 (supra n.4), para.17 (emphasis added).

[30] Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95), Joined cases C-34/95, C-35/95 and C-36/95, EU:C:1997:344.

[31] Ibid., para.42.

[32] Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP), Case C-405/98, EU:C:2001:135.

prohibition, which was designed to generally reduce the sales of alcoholic drinks. Could the national law be regarded as a selling arrangement that fell outside the scope of Article 34? The Court denied this and interestingly rules as follows:

> "It is apparent that a prohibition on advertising such as that at issue in the main proceedings not only prohibits a form of marketing a product but in reality prohibits *producers and importers* from directing any advertising messages at consumers, with a few insignificant exceptions. (…) [I]n the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway *is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.* (…) A prohibition on advertising such as that at issue in the main proceedings must therefore be regarded as affecting the marketing of products from other Member States more heavily than the marketing of domestic products and as therefore constituting an obstacle to trade between Member States caught by Article [34] of the Treaty."[33]

On a formal level, the Court here simply inverted its *Keck* reasoning. For instead of examining whether the national measure discriminated in fact and *therefore* impeded market access,[34] it employed its market access test to determine whether the national law discriminated or not! This formal inversion elevated the market access test to centre-stage.[35] A selling arrangement would thus be held discriminatory if – factual not legal – access to the host market was harder for foreign than for domestic goods.[36] (Yet the problem with this approach is that a prohibition or limitation on any advertising format will *always* benefit domestic goods "the consumption of which is linked to traditional

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[33] Ibid., paras.20-21 & 25 (emphasis added).

[34] This had still been the case in Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH, Case C-254/98, EU:C:2000:12.

[35] A. Kaczorowska, *Gourmet* Can have his *Keck* and Eat it!, (2004) 10 European Law Journal 479 at 486.

[36] See expressly, Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval, Case C-322/01, EU:C:2003:664, paras.74-75: "A prohibition such as that at issue in the main proceedings is more of an obstacle to pharmacies outside Germany than to those within it. Although there is little doubt that as a result of the prohibition, pharmacies in Germany cannot use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they are still able to sell the products in their dispensaries. However, for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products. Accordingly, the prohibition does not affect the sale of domestic medicines in the same way as it affects the sale of those coming from other Member States."

social practices and to local habits and customs";[37] and in order to escape this inevitable conclusion, the Court has tried to develop a line between *absolute* prohibitions and *relative* limitations on the marketing of goods.[38]) This rise of the market access test *within* the discrimination test seriously undermined the formal elements of the discrimination "rule",[39] and it consequently intensified – rather then solved – the question as to the relationship between the two doctrinal tests under Article 34.

But what was the relationship between the principle of mutual recognition and the market access test? Their ambivalent relationship can clearly be seen in *Commission v Poland*.[40] The Court here dealt with a Polish requirement to reposition the steering wheel of British cars to the left-hand side before they could be registered in Poland. (The facts positioned the case somewhere between the *Cassis* and the *Trailer* line; yet the case lay closer to the latter since the vehicles could be sold but not used.[41]) And in its reasoning,

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[37] Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP), Case C-405/98 (supra n.32), para.21.

[38] The Court indeed appears to have adopted a softer position where the national advertising law does only restrict – and not prohibit – advertising or marketing, see: see: Leclerc-Siplec, Case C-412/93, EU:C:1995:26; as well as Karner Industrie-Auktionen GmbH v Troostwijk GmbH, Case C-71/02, EU:C:2004:181, para. 42: "As regards the second condition, Paragraph 30(1) of the UWG, contrary to the national provisions which gave rise to Joined Cases C-34/95 to C‑36/95 *De Agostini and TV-Shop* (supra n.30); and *Gourmet,* Case C‑405/98 (supra n.32), does not lay down a total prohibition on all forms of advertising in a Member State for a product which is lawfully sold there. It merely prohibits any reference, when a large number of people are targeted, to the fact that goods originate from an insolvent estate if those goods no longer constituted part of the insolvent estate, on grounds of consumer protection. Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and, consequently, also to reduce the volume of sales of goods from other Member States, it nevertheless does not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member State in question. In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition has had such an effect." However, in A-Punkt Schmuckhandels GmbH v Claudia Schmidt, Case C-441/04, EU:C:2006:141, the Court seems to have qualified this qualification (ibid., paras.22-25).

[39] For a positive view of this development, see: P. Koutrakos, On groceries, alcohol and olive oil : more on free movement of goods after Keck, (2001) 26 E.L. Rev 391.

[40] Commission v Poland, Case C‑639/11, EU:C:2014:173; and see also Commission v Lithuania, Case C-61/12, EU:C:2014:172.

[41] In this sense, Advocate General Jääskinen, Case C‑639/11 Commission v. Republic of Poland and Case C‑61/12, Commission v. Republic of Lithuania, EU:C:2013:728, para.19: "It must be emphasised too that the present actions concern infringements arising not from interference with the freedom to market vehicles having their steering equipment on the right, but from a restriction of the ability to register such vehicles in Lithuania and Poland, respectively. Indeed, neither the sale nor the import of those vehicles is prohibited in those Member States. Only the registration of that category of vehicles, regardless of whether they were produced locally or imported, is prohibited unless that equipment is transferred to the left-hand side." For a case, where the balanced fell into the Cassis-side, and the Court consequently used a Cassis-like justification, see: as well as more recently: Case C‑481/12, UAB 'Juvelta' v. VI 'Lietuvos prabavimo rümai', EU:C:2014:11, esp. para.17: "Therefore, the legislation not having been harmonised, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marked, rules that lay down requirements to be met by

the Court held that "the contested legislation constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU, in so far as its effect is to *hinder access to the Polish market* for vehicles with steering equipment on the right, which are *lawfully constructed and registered in Member States other than the Republic of Poland*".[42] The Court here combined its consumer-use jurisprudence with the mutual recognition principle; and this development not only suggested that the two are somehow linked but the Court here appeared to regard the latter principle as part and parcel of a – vertically – broader substantive market access test.

The Rise of the Unitary Approach: The Ker-Optika *Formula*

Has the rise of the market access test led to a single doctrinal framework in which all three tests could be combined? A first strong signal in favour of such a unitary approach may indeed be seen in *Ker-Optika*.[43] The case involved a Hungarian limited partnership that had sold contact lenses via its Internet site. This sales technique was prohibited by Hungarian legislation, which required that contact lenses be sold in specialized optical goods shop. The applicant challenged this "selling arrangement" on the ground that it constituted a violation of Article 34. Which test would the Court apply? The analyses of the Courts sits on the fence between the (old) category approach and the (new) unitary approach. The Court thereby started out with the latter. Expressly referring to *Dassonville* and *Trailer*, it summed up the normative principles governing Article 34 the following way:

> "According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 34 TFEU. It is also apparent from settled case-law that Article 34 TFEU reflects the obligation to comply with the *principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets*. Accordingly, measures adopted by a Member State the

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such goods constitute measures having equivalent effect prohibited by Article 34 TFEU. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods."

[42] Commission v Poland, Case C- 639/11 (supra n.40), para.52 (emphasis added). The Court referred to Dassonville, Cassis and Trailers for this proposition.

[43] Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete, Case C-108/09 (supra n.25).

> object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having an effect equivalent to quantitative restrictions, as are rules that lay down requirements to be met by such goods, even if those rules apply to all products alike. *Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept*."[44]

What can we read out of the judgment, and what should we read into it? The Court here defined the scope of Article 34 abstractly by reference to the *Dassonville* formula as well as our three substantive principles. These three principles are presented as exhaustive. For when the Court states that "[a]ny other measure" must fall within the third principle, it not only appears to rule out the existence of a fourth substantive principle within Article 34; it equally seems to disallow the direct application of the *Dassonville* formula. This part of the judgment therefore suggests that the abstract (jurisdictional) definition of Article 34 in *Dassonville* must always be matched and mediated by – at least – one of the three substantive principles listed by the Court.

But what is the relationship between these three principles? On the textual surface, the above passage favours a unitary approach. For the Court did *not* expressly correlate the three principles with specific categories of national laws and instead used the generic "measures" and "rules" for each of the three principles. The non-discrimination principle would consequently outlaw *all* national measures that discriminate against imports;[45] while the (federal) principle of mutual recognition will apply to *all* national laws doubly burdening goods produced in other Member States. Finally, the market access test would apply to "[a]ny other measure" here only clarified that the Court would – practically – only come to test a national measure against the third principle when it had not already been caught by the other two substantive principles.

Had the Court consistently followed this line of argument it would have clearly turned its back on the classic category approach; yet hesitant to de-revolutionize the *Keck*-revolution, a second part of the judgment preferred the more conformist status quo

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[44] Ibid., paras.47-50.

[45] It has been argued that this has always been the case; see: P. Wennerås and K. Bøe Moen, Selling arrangements, keeping Keck (supra n.15), 388: "The latter judgments indicate that non-discrimination is the primary criterion determining whether any measures, not only selling arrangements, fall within Article 34." And again at 393: "The distinction between selling arrangements and other measures appears consequently no longer relevant under Article 34 – all being subject to an assessment of discrimination in law or in fact – while product requirements remain a distinct category by virtue of their inherent discriminatory effects." Non-discrimination thus operates "as the primary" test and market hindrance as a "subsidiary and thus supplementary test".

reasoning. For the Court here – directly or indirectly, actually or potentially – returned to *Keck*.[46] Thus: national rules governing selling arrangements were subject to a discrimination test, although the latter was (again) defined as an *unequal* market access test. This normative ambivalence stemmed from the Court – to employ a delightful *bonmot* – wishing to have its *Keck* and eat it.[47] The result was an "easy" case making "bad" law.[48]

Nonetheless: the attempt to systematize and structure the normative content of Article 34 resurfaced in *ANETT*.[49] The case involved a Spanish import prohibition for tobacco retailers, who were required to purchase their goods from authorized wholesalers. The Spanish legislation thus prohibited parallel imports by retailers but instead of referring to a "classic" jurisprudential line here,[50] the Court repeated its new doctrinal triptych,[51] and held:

> "In the main proceedings, nothing indicates that the national legislation at issue has the object or effect of treating tobacco coming from other Member States less favourably. Nor does it concern the requirements that those products must meet. However, it is still necessary to examine whether this legislation hinders the access of tobacco products coming from other Member States to the Spanish market. (…) [T]he tobacco retailers are prevented from procuring supplies in other Member States, even if the manufacturers and wholesalers located there could offer more

[46] Ker-Optika, Case C-108/09 (supra n.25), paras.51-54 read: "[T]he application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from Dassonville, unless those provisions apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the selling of domestic products and of those from other Member States. (…) It is clear that the prohibition on selling contact lenses by mail order deprives traders from other Member States of a particularly effective means of selling those products and thus significantly impedes access of those traders to the market of the Member State concerned. In those circumstances, that legislation does not affect in the same manner the selling of contact lenses by Hungarian traders and such selling as carried out by traders from other Member States."

[47] This brilliant pun was first used by French academic on Gourmet (A. Kaczorowska, "Gourmet" can have his "Keck" and eat it! (supra n.35).

[48] P. Caro De Sousa, Through contact lenses, darkly: identifying restrictions to free movement harder than meets the eye? Comment on Ker-Optika, (2012) 37 E.L. Rev. 79 at 81: "apparently straightforward case is strangely convoluted".

[49] ANETT v Administración del Estado, Case C-456/10, EU:C:2012:241.

[50] In Criminal proceedings against Harry Franzén, Case C-189/95, EU:C:1997:504, for example, when dealing with a Swedish system of production or wholesale licences for alcoholic beverages, the Court – having given its *Dassonville* formula as a definition of the concept of MEEQR – simply held that "[t]he licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States in that it imposes an additional cost on such beverages" (ibid., para.71). This was indeed an easy case as the national rule was distinctly applicable to imports. But see also: Commission v Finland, Case C-54/05, EU:C:2007:168, para.31: "In addition, the Court of Justice has already ruled that Article [34] precludes the application in intra-[Union] trade of national provisions which require, even as a pure formality, import licences or any other similar procedure."

[51] ANETT (supra n.49), para.33.

> advantageous procurement conditions, particularly in border areas, either because of their geographic proximity or because of the specific delivery methods they offer. All of these elements are capable of having a negative effect on the choice of products that the tobacco retailers include in their range of products and, ultimately, on the access of various products coming from other Member States to the Spanish market."[52]

In the above passage, the Court tested the Spanish measure against all three principles: in the absence of discrimination or an application of domestic product requirements to imports, it found that it was "still" (!) necessary to subject the Spanish measure to a market access test. This formulation suggested two things. First, the Court – again through its Third Chamber – here appears to favour a unitary approach to the three substantive principles underlying Article 34; and it, secondly, seemed to indirectly confirm that a breach of at least one of its three substantive principles was required before a violation of Article 34 could be found. And this reading was subsequently confirmed, albeit indirectly, in *Elenca*.[53]

Jurisprudential Inconsistencies: Two Unresolved Questions

Every constitutional court will wish to appear consistent over time; and yet: every *good* constitutional Court will recognize that constitutional change through the judiciary is a necessary undemocratic "evil", where the social reality underpinning a constitutional order is itself changing.[54] Problems however arise, where judicial inconsistencies are not the result of changes over time but emerge – simultaneously – from dogmatic fragmentation *within* a "contemporary" court. Sadly, it is this internal inconsistency that has characterized the European Court's contemporary jurisprudence on Article 34 TFEU. For despite the strong "rhetorical" push offered by its Third Chamber, recent jurisprudence has revealed that the various chambers of the Court do not share the same understanding of Article 34; and this has created two major uncertainties and problems. First, what is the nature of the *Dassonville* formula and its relation to the three substantive

[52] Ibid., paras.36-42.

[53] Elenca Srl v Ministero dell'Interno, Case C-385/10, EU:C:2012:634

, esp. para.23.

[54] In the famous words of John Marshall: "[W]e must never forget that it is a *constitution* we are expounding." (*McCulloch v. Maryland*, 17 U.S. 316 (1819), 407).)

principles described above; and, secondly, has the unitary approach really replaced the classic category approach, and with it *Keck*?[55] Let us explore these problems in the final section of this article.

Dogmatic Uncertainty No 1: The Three Tests and the Dassonville *Formula*

The *Ker-Optika* formula had suggested that for Article 34 to be breached at least one of the three substantive principles had to be violated; and yet in *Åland*, the Grand Chamber of the Court has curiously put this into question.[56] The case concerned a Swedish law that aimed at assisting the production of green electricity. Sweden had created a system of electricity certificates that suppliers (and users) were obliged to hold. The award of these certificates was thereby linked to electricity production installations in Sweden; and when the applicant company sought permission for a wind farm in Finland, the certification was rejected on the ground that the green electricity installation was outside Sweden. This was a (materially) discriminatory measure,[57] yet the Grand Chamber reasoned, without any express reference to any of the three *Ker-Optica* principles, as follows:

> "The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition set out in Article 34 TFEU having equivalent effect to quantitative restrictions on imports, Article 34 covers *any national measure capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade.* As it is, it must be noted in that regard that the legislation at issue is capable, in various ways, of hindering — at least indirectly and potentially — imports of electricity, especially green electricity, from other Member States. "[58]

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[55] In this sense: S. Dietz & T. Streinz, Das Marktzugangskriterium in der Dogmatik der Grundfreiheiten, (2015) 50 EuR 50 at 69: "Bei sorgfältiger Prüfung des Drei-Stufen-Tests hat die *Keck*-Formel ausgedient." And see also: I. Lianos, In Memoriam Keck: the reformation oft he EU law on the free movement of goods (2015) 40 E.L. Rev. 225.

[56] Ålands vindkraft AB v Energimyndigheten, Case C-573/12, EU:C:2014:2037. For an extensive discussion of the case, see: M. Szydlo, How to reconcile national support for renewable energy with internal market obligations? The Task for the EU legislature after Ålands Vindkraft and Essent, (2015) 52 C.M.L. Rev 489.

[57] In this sense also: Advocate General Bot, Ålands vindkraft AB v Energimyndigheten, Case C-573/12, EU:C:2014:37, para,76: "Although the Swedish green certificate scheme does not prohibit the importation of electricity, it indisputably confers an economic advantage which may favour producers of green electricity located in Sweden as compared with producers located in other Member States, since, whereas the former benefit from additional income from the sale of green certificates, which is in effect a production premium, the income of the latter is derived solely from the sale of green electricity."

[58] Ålands vindkraft AB v Energimyndigheten, Case C-573/12, paras.65-67.

The Court here appeared to apply the *Dassonville* formula as if it was a substantive decision rule! For not only was the judgment devoid of any express reference to the principles of discrimination, mutual recognition or market access; rhetorically, the *Dassonville* formula provided the sole (major) premise under which the Court subsumed the case.[59] Was this omission of the three doctrinal tests a conscious choice or an unconscious aberration? The Court (Second Chamber) seems to have subsequently shown a preference for the latter reading in *Canadian Oil Company*.[60] Dealing with a Swedish registration requirement for chemical substances that applied to domestically produced or imported goods alike, the Court explained its finding of a violation of Article 34 TFEU as follows:

> "[A]ll measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU … [T]he mandatory nature of the registration of the import of chemical products with the competent national authority constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU, since the fact of imposing formalities for import is capable of hindering trade within the European Union *and impeding access to the market for goods which are lawfully produced and marketed in other Member States*[.]"[61]

This reasoning appears to confirm, albeit weakly and without express reference to the *Ker-Optika* formula, that any national measure that formally qualifies under the *Dassonville* formula must also violate the (substantive) market access test. Doubts however remain; and they are intensified by a second doctrinal uncertainty.

Dogmatic Uncertainty No. 2: Keck – *Neither Alive Nor Dead?*

What about the *Keck* solution for selling arrangements? While *Ker-Optika* (and its

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[59] Yet importantly: the *Dassonville* formula was at least translated into the concrete proposition that national measures must be capable of hindering "*imports* from other Member States".) The Advocate General Bot (supra n.57), even referred to the old-fashioned idea of "trading rules" in para.74 of his opinion.

[60] Case C‑472/14, Canadian Oil Company Sweden AB, Anders Rantén applicants v Riksåklagaren, EU:C:2016:171.

[61] Ibid., para.43-44

progeny) seemed to suggest that the market access test could independently apply to selling arrangements, the Fifth Chamber of the Court appears to have recently strengthened the *Keck* category approach in *Visnapuu*, .[62] The case concerned the question whether a seller of alcoholic beverages established in another Member State would need to hold a Finish retail sale license so as to sell drinks within Finland. The Finnish rule constituted a "selling arrangement" that – while non-discriminatory – clearly hindered market access. How would the Court doctrinally analyze this situation? The Court held as follows:

> "[T]he prohibition of measures having an effect equivalent to a quantitative restriction, laid down in Article 34 TFEU, applies to all legislation of the Member States that is capable of hindering, directly or indirectly, actually or potentially, trade between Member States. (…) *The Court of Justice has indeed held that national provisions restricting or prohibiting certain selling arrangements that, first, apply to all relevant traders operating within the national territory, and, secondly, affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States are not liable to hinder, directly or indirectly, actually or potentially, trade between Member States within the meaning of the case-law initiated by Dassonville.* However, the retail sale licence requirement at issue in the main proceedings does not meet the first condition set out by the Court in Keck and Mithouard, according to which the national provisions at issue must apply to all relevant traders operating within the national territory (…) and therefore it is not necessary to examine whether that requirement affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."[63]

The Court here appears to give *Keck* another licence to live;[64] yet it did so by – badly – reading *Keck* into *Dassonville*. For instead of seeing *Keck* as introducing a "formal" rule that insists on discrimination as an independent substantive test, the Court once more suggested that it is the *Dassonville* formula as such that applies to the specific case. And it was – again – the Second Chamber that has questioned this very interpretation in *Scotch Whisky Association*.[65] The case assessed the attempt by the Scottish Parliament to reduce

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[62] Visnapuu v Kihlakunnansyyttäjä and Suomen valtio – Tullihallitus, Case C-198/14, EU:C:2015:751.

[63] Ibid., paras.98-108 (emphasis added).

[64] It is therefore at least doubtful whether recent developments on Article 34 have "put into question two major contributions of *Keck*": "the Court disposed of the factual presumption that selling arrangements do not constitute an obstacle to trade", and the Court also adopted "a broad definition of the "market access" rule, which looks very close, if not being identical, to the "obstacles to trade" approach that animated the jurisprudence of the Court since Dassonville/Cassis de Dijon until its reversal by Keck" (I. Lianos, In Memoriam Keck (supra n.55), 238).

[65] Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland, Case C- 333/14, EU:C:2015:845.

alcohol consumption by introducing a set minimum price for alcoholic beverages on the basis of a set prices per unit of alcohol – a decision that was challenged by producer associations of alcoholic beverages, including the Scotch Whisky Association. Having surveyed the various past jurisprudential lines, Advocate General Bot thereby gave the following advice to the Court:

> "According to the *formula* now usually employed in the case-law, Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets. I infer from that *standard formula* that a national measure may constitute an obstacle not only when, as a selling arrangement, it is discriminatory, in law or in fact, but also when, irrespective of its nature, it impedes access to the market of the Member State concerned. (…) The rules at issue in the main proceedings, which are acknowledged to apply without distinction to all the operators concerned who carry out their activity on the national territory, must therefore be regarded as a measure having effect equivalent to a quantitative restriction on imports contrary to Article 34 TFEU in that they are capable of constituting an obstacle to access to the market, solely because they prevent the lower cost price of the imported products from being reflected in the selling price to consumers.[66]

The Second Chamber of the Court was, sadly, less explicit about its reasoning. But making express reference to the opinion of the Advocate General, it held:

> "[A]ll measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU. As the Advocate General stated in points 59 and 60 of his Opinion, the fact that the legislation at issue in the main proceedings prevents the lower cost price of imported products being reflected in the selling price to the consumer means, by itself, that that legislation is capable of hindering the access to the United Kingdom market of alcoholic drinks that are lawfully marketed in Member States other than the United Kingdom of Great Britain and Northern Ireland, and constitutes therefore a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU."[67]

If the Court here wished to follow *all* the dogmatic elements excellently espoused in the

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[66] Advocate General Bot, EU:C:2015:527, paras.58-60. While thus rejecting the Keck category approach on doctrinal grounds, the Advocate General nonetheless examined "purely in the interest of completeness" (ibid., para.61), whether the Keck test had been fulfilled or not; and he ultimately found that "from whatever standpoint they are analysed, the rules at issue in the main proceedings appear to be contrary to Article 34 TFEU" (ibid., para.69).

[67] Scotch Whisky Association (supra n.65), paras.31-32 (emphasis added).

Advocate General's opinion, then *Scotch Whisky Association* would – again – be a clear signal in favour of the unitary approach and its idea that all national restrictions will be subject to a (residual) market access test. But again: the internal inconsistencies within the Court leave a serious legal uncertainty at the heart of the European internal market; and it is hoped that the Full Court will sooner rather than later speak an authoritative *Machtwort* to unify the Babylonian polyphony within the Court.

Conclusion

Which market model governs Article 34 TFEU? We saw above that the post-*Keck* Court originally refused to sign up to a uniform market model for all national measures hindering intra-Union trade. Instead, it cultivated three jurisprudential lines with three different tests for three different categories of national measures. For selling arrangements, the Court favoured an international model, while a federal model applied to product requirements (and related measures); and with *Italian Trailers*, it finally created a third jurisprudential line on consumer-use restrictions that came close to a national market model.

How do these three jurisprudential lines relate to each other? Two theoretical approaches were here discussed. According to the (old) category approach, each jurisprudential line is subject to a different market model that exclusively applies to the national measures it covers. By contrast, the unitary approach advocates a single market model; and it therefore subjects all national measures to the three principles of non-discrimination, mutual recognition, and free market access. In its recent jurisprudence, the Court has given strong rhetorical signals in favour of a unitary approach; yet at the same time, internal inconsistencies within the Court have created new uncertainties. The Court has thus not yet conclusively answered the question whether the three principles apply to mutually exclusive categories of national measures; nor has it definitely decided whether one of the three substantive principles always needs to be violated before a breach of Article 34 has occurred.

What is the better solution here? With regard to the first problem, the Court should – following American jurisprudence – adopt the unitary approach.[68] Subjecting all national measures to a (residual) market-access-test, the Court's jurisprudence could, at the same time, gain dogmatic clarity and casuistic flexibility. For the formal disappearance of the category approach will remove the sharp conceptual edges inherent in subjecting different types of measures to different tests, while the unitary approach could simultaneously and indirectly draw on the advantages of the non-discrimination and mutual recognition tests as specific "rules" that will invite strict scrutiny. With regard to "selling arrangements", this can arguably already be read into the existing case law, and here especially: *Gourmet*.[69] The same desire to create a unified normative framework for Article 34 can also be seen in *Commission v Poland*.[70] For the Court here treated the mutual recognition principle and the market access principle not as mutually exclusive; instead, it appeared to view the latter as a – vertically – broader substantive test that included the more formal principle on mutual recognition.

Importantly: a generalized market-access-test should *not* mean that the Court unconditionally outlaws all national measures that restrict freedom of trade generally. Any interpretation of Article 34 TFEU must always be balanced – whether through a substantive threshold that protects national regulatory spaces within Article 34; or through the development of an "excessive burden" test at the justificatory level. Economic interests must indeed never become the Court's sole or dominant value in interpreting Article 34. The best warning against an excessively liberal interpretation here comes from the United States, where the de-legitimizing shockwaves of the *Lochner* Supreme Court are still felt a century later.[71] This also helps us with regard to the second problem. For the Court should not forget – merely two decades after *Keck* – that a

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[68] In line with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), it could cultivate a single framework with various prongs against which *each* State measure needed to be examined. Discrimination here simply provides an easy – formal – shortcut to finding a violation of Article 34, while a non-discriminatory rule could fall within the scope of the provision if it – materially – impeded market access.

[69] Gourmet, Case C-405/98 (supra n.32).

[70] Commission v Poland, Case C- 639/11 (supra n.40).

[71] Prior to the New Deal, the Supreme Court had pursued a controversial course of "economic due process" in which it forced an economic philosophy of free trade as an individual right upon the States. The most famous manifestation here is *Lochner v. New York*, 198 U.S. 45 (1905). In this case, an employer had violated of a New York state statute limiting the maximum number of working hours for bakers; and infamously, the Court accepted that the substantive-due-process rationale according to which economic (federal) rights could be enforced as against the States. The idea of economic due process however eventually declined (cf. West Coast Hotel v Parrish, 300 US 379 (1937), and today Lochner has become a veritable "pariah" (D. A. Strauss, Why was Lochner Wrong?, (2003) 70 University of Chicago Law Review 373 at 3744).

mechanical application of the *Dassonville* formula is inherently indeterminate and dangerously unlimited. It should consequently see the *Dassonville* formula as a *jurisdictional* principle that must always be complemented by one – or all – of the *substantive* principles (or tests) developed in its past jurisprudence. Only in this way can the substantive achievements of the *Keck* revolution be preserved, while its formal categories may – like a used-turned-useless ladder – be thrown away.[72]

But regardless which approach to the relationship between the three tests the Court will finally choose, the latest jurisprudence on Article 34 has revealed one thing: the increasing inconsistency among the Court's chambers (and its Advocates-Generals).[73] There is a marked absence of a common intellectual frame within the Court; or at least, a lamentable deficiency in the articulation of all the dogmatic elements within its chain of

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[72] For the famous ladder metaphor, see: L. Wittgenstein, Tractatus Logico-Philosophicus (Routledge, 1974), 89 – Proposition 6.54.

[73] Compare, again, the solution offered by the Fifth Camber in Visnapuu (supra n.62) with the solution, only six weeks later, of the Second Chamber in Scotch Whisky Association (supra n.65). For an excellent analysis of the consistency issue between chambers, see L. Woods, Consistency in the Chambers of the European Court of Justice: A Case Study on the Free Movement of Goods, (2012) 31 Civil Justice Quarterly 338. Sadly, but perhaps less importantly, inconsistency also exists among the various Advocates-General. For two very different Advocate General opinions, within the space of seven months, compare: Advocate General Bot in the Scotch Whisky Association case (supra n.66) with the recent opinion of Advocate General Wahl in Openbaar Ministerie v. Etablissements Fr. Colruyt NV, Case C‑221/15. The latter delivered his opinion on 21 April 2016; and here we encounter yet another attempt to keep Keck alive! The case involved several Belgian supermarkets that sold tobacco products at a unit price below the price indicated on the revenue stamp affixed by the manufacturer or importer; and the question arose, whether the national prohibition to do so violated Article 34 TFEU. And the learned Advocate General held (para.50-58): "Article 34 TFEU prohibits quantitative restrictions on imports or measures having equivalent effect. According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the Union are to be considered to be measures having equivalent effect to quantitative restrictions for the purposes of that treaty provision. However, in the line of case-law originating with *Keck and Mithouard*, the Court found that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements does not constitute such a hindrance, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and that of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede their access any more than it impedes the access of domestic products. Against that background, I take the view that the aspect of the law at issue which, in essence, prohibits the sale of tobacco products at a price below that freely set by the manufacturer or importer, should be considered a 'selling arrangement' within the meaning of the *Keck and Mithouard* case-law. Indeed, the rules provided for in that legislation do not affect the characteristics that tobacco products must have to be marketed in Belgium, but solely the arrangements under which they may be sold. Therefore, consideration must be given to whether the law at issue applies to all relevant traders operating within the national territory and affects in the same manner, in law and in fact, the marketing of domestic products and that of those from other Member States. (…) The answer to the second question should thus be that Article 34 TFEU does not preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price on the revenue stamp affixed by the manufacturer or importer."

reasoning.[74] This is not just a matter of bad judicial "form".[75] For even if the Court reaches, with regard to the substance, a "right" decision in a specific case, this "output" legitimacy cannot justify flaws in its formal reasoning. Constitutional courts are tasked to "construct" – through words – a conceptual framework that explains the past and guides into the future;[76] and a judicial decision will consequently only be "legitimate", where judicial rhetoric properly "constructs" social reality. Thus: if the Court wishes to explain the philosophy and rationale behind the internal market, the Court must do – much – better, and that very soon. Constitutional ambivalences are – of course – sometimes necessary; yet if that ambivalence lasts for decades (*Keck* was decided in 1993!), the Court will eventually lose intellectual credibility by seemingly not knowing what it is "doing", and the legal uncertainties thereby generated make it hard and harder to explain the European internal market to its citizens.

[74] Of course, passionate deliberations within the Court may often remove some (controversial) steps within the reasoning; and yet, in light of the recent quality of judgments, I fear that Pierre Pescatore must turn in his grave! For his immortal advice to the drafters of judgments, see: Vade-Mecum : Recueil de formules et de conseils pratiques à l'usage des rédacteurs d'arrêts (Bruylant, 2008).

[75] For a recent and severe attack on the Court's lack of linguistic imprecision, see: L. Gormley, Inconsistencies and Misconceptions in the Free Movement of Goods, (2015) 40 E.L. Rev. 925.

[76] On the theory of „speech acts" generally, see: J.L. Austin, How to Do Things With Words (Harvard University Press, 1975); as well as: J.R. Searle, Speech Acts: An Essay in the Philosophy of Language (Cambridge University Press, 1969).